

CALIFORNIA COASTAL COMMISSION

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49 th Day:	September 8, 2005
Staff:	Ruby Pap
Staff Report:	July 29, 2005
Hearing Date:	August 12, 2005

STAFF REPORT: APPEALSUBSTANTIAL ISSUE

APPEAL NO.:	A-1-MEN-05-035
APPLICANTS:	Gordon Wardlaw
LOCAL GOVERNMENT:	County of Mendocino
DECISION:	Approval with Conditions
PROJECT LOCATION:	In the Town of Mendocino, approximately 1/4 mile east of Highway One, on the north side of Little Lake Road (CR 408) at 44658, 44654 and 44650 Little Lake Road (APNs 119-090-42, 43, 44) (Mendocino County).
PROJECT DESCRIPTION:	Construction of an approximately 2,418 - square-foot two story single-family residence with a maximum height of 28 feet above grade. Construction of an approximately 690 - square-foot detached garage with a maximum height of 16 feet above grade. Construction of a 16-foot-wide approximately 380-foot-long driveway access to the proposed house site (APN 119-090-42) from Little Lake Road across APNs 119-090-43 and 44. The approved driveway would cross a wetland to access the undeveloped APN 119-090-42 (0.3-acre) to be developed with the approved residence. Electrical, telephone, and sewer services would be extended underground along the approved driveway. The project includes a 1:1 ratio wetland mitigation plan.

APPELLANTS: Commissioners Bonnie Neeley and Sara Wan

SUBSTANTIVE FILE 1) Mendocino County CDP No. 111-02; and
DOCUMENTS: 2) Mendocino County Local Coastal Program

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that a SUBSTANTIAL ISSUE exists with respect to the grounds on which the appeal has been filed and that the Commission hold a de novo hearing, because the appellant has raised a substantial issue with the local government's action and its consistency with the certified Local Coastal Program (LCP).

The development, as approved by the County, consists of (1) the construction of an approximately 2,418 - square-foot two story single-family residence with a maximum height of 28 feet above grade; (2) construction of an approximately 690 - square-foot detached garage with a maximum height of 16 feet above grade; and (3) construction of a 16-foot-wide approximately 380-foot long driveway access to the proposed house site (APN 119-090-42) from Little Lake Road across APNs 119-090-43 and 44. The approved driveway would cross a wetland to access the undeveloped APN 119-090-42 (0.3-acre) to be developed with the approved residence. Electrical, telephone, and sewer services would be extended underground along the proposed driveway. The project includes a 1:1 ratio wetland mitigation plan.

The project site is located in the Town of Mendocino, approximately 1/4 mile east of Highway One, on the north side of Little Lake Road (CR 408) at 44658, 44654 and 44650 Little Lake Road (APNs 119-090-42, 43, 44) in Mendocino County.

The Appellant poses two separate contentions, including: (1) the project as approved is inconsistent with the Mendocino County LCP provisions regarding development in wetlands, which do not include residential driveways as allowable developments in wetlands; and (2) even if residential uses were allowable developments in wetlands, the approved project is inconsistent with LCP provisions that require that permitted development in wetlands be the "least environmentally damaging alternative."

Staff recommends that the Commission find that both contentions are valid grounds for an appeal, and that both contentions raise a substantial issue of conformity of the approved development with the certified LCP.

Staff recommends that the Commission find that the first contention raises a substantial issue because the County's approval of the residential driveway is inconsistent with LCP policies for development in wetlands, which do not include residential uses as allowable developments in wetlands.

Staff recommends that the Commission find that the second contention also raises a substantial issue because the County did not provide adequate analysis to support their finding that the project as approved is the “least environmentally damaging alternative,” inconsistent with LCP policies regarding development in wetlands and other environmentally sensitive habitat areas (ESHAs).

The motion to adopt the staff recommendation of Substantial Issue is found on page no. 4.

STAFF NOTES:

1. **Appeal Process**

After certification of Local Coastal Programs (LCPs), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Section 30603 states that an action taken by a local government on a coastal development permit application may be appealed to the Commission for certain kinds of developments, including developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, or within three hundred feet of the inland extent of any beach, or of the mean high tide line of the sea where there is no beach, or within one hundred feet of any wetland or stream, or within three hundred feet of the top of the seaward face of any coastal bluff, or those located in a sensitive coastal resource area.

Furthermore, developments approved by counties may be appealed if they are not designated the “principal permitted use” under the certified LCP. Finally, developments which constitute major public works or major energy facilities may be appealed, whether approved or denied by the city or county. The grounds for an appeal are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program and, if the development is located between the first public road and the sea, the public access policies set forth in the Coastal Act.

The subject development is appealable to the Commission pursuant to both 30603(a)(2) and (a)(3) of the Coastal Act because the proposed development (1) involves development within, and within 100 feet of, a wetland, and (2) is within a sensitive coastal resource area. With regard to the latter bases for appeal, Section 20.608.038(6) of the Mendocino Town Zoning Code and Section 30116 of the Coastal Act define sensitive coastal resource areas as “those identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity,” including, among other categories, “special communities.” Policy 4.13-1 of the Mendocino Town Plan designates the town of Mendocino as a special community. Therefore, the development is located within a sensitive coastal resource area as defined in the LCP, and, as such, is appealable to the Commission.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that the appeal raises no substantial issue of conformity of the approved project with the certified LCP. Since the staff is recommending substantial issue, unless three Commissioners object, it is presumed that the appeal raises a substantial issue and the Commission may proceed to its *de novo* review.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised.

The only persons qualified to testify before the Commission on the substantial issue question are the applicants, the appellant and persons who made their views known to the local government (or their representatives). Testimony from other persons regarding substantial issue must be submitted in writing.

Unless it is determined that there is no substantial issue, the Commission will proceed to the *de novo* portion of the appeal hearing and review the merits of the proposed project. This *de novo* review may occur at the same or subsequent meeting. If the Commission were to conduct a *de novo* hearing on the appeal, the applicable test for the Commission to consider would be whether the development is in conformity with the certified Local Coastal Program.

2. Filing of Appeal

One appeal was filed by Commissioners Bonnie Neeley and Sara Wan (Exhibit No. 3). The appeal was filed with the Commission in a timely manner on July 21, 2005 within 10 working days of receipt by the Commission of the County's Notice of Final Action (Exhibit No. 2) on July 7, 2005.

I. MOTION, STAFF RECOMMENDATION AND RESOLUTION

Pursuant to Section 30603(b) of the Coastal Act and as discussed below, the staff recommends that the Commission determine that a substantial issue exists with respect to the grounds on which the appeal has been filed. The proper motion is:

MOTION:

I move that the Commission determine that Appeal No. A-1-MEN-05-035 raises No Substantial Issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a *de novo* hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-1-MEN-05-035 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

II. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. APPELLANTS' CONTENTIONS

The Commission received one appeal of the County of Mendocino's decision to conditionally approve the development from Commissioners Bonnie Neeley and Sara Wan. The project as approved by the County involves (1) the construction of an approximately 2,418 - square-foot two story single-family residence with a maximum height of 28 feet above grade; (2) construction of an approximately 690 - square-foot detached garage with a maximum height of 16 feet above grade; and (3) construction of a 16-foot-wide approximately 380-foot-long driveway access to the proposed house site (APN 119-090-42) from Little Lake Road across APNs 119-090-43 and 44. The approved driveway would cross a wetland to access the undeveloped APN 119-090-42 (0.3-acre) to be developed with the approved residence. Electrical, telephone, and sewer services would be extended underground along the proposed driveway. The project includes a 1:1 ratio wetland mitigation plan.

The approved project is located in the Town of Mendocino, approximately 1/4 mile east of Highway One, on the north side of Little Lake Road (CR 408) at 44658, 44654 and 44650 Little Lake Road (APNs 119-090-42, 43, 44) in Mendocino County.

The appeal raises two contentions alleging inconsistency of the approved project with the County's certified LCP. The appellants' contentions are summarized below, and the full text of the contentions is included as exhibit no.3.

1. Development in Wetlands

The Appellants contends that the approval of the residential driveway is inconsistent with the wetland policies of the LCP, which do not include residential uses as allowable developments in wetlands.

2. Least Environmentally Damaging Feasible Alternative

The Appellants further contend that even if the residential driveway were an allowable development in a wetland, the driveway as approved by the County would still be inconsistent with ESHA provisions in the LCP requiring that the project be the “least environmentally damaging alternative,” because there are feasible less environmentally damaging alternatives, including (a) bridging or cantilevering the vehicular access over the wetland and (b) not conducting any development on the subject property, which would require no wetland fill, and because there is already an existing residence on APN 119-090-44, which provides for a reasonable use of the property.

B. LOCAL GOVERNMENT ACTION

On June 23, 2005, the Mendocino County Coastal Permit Administrator conditionally approved the coastal development permit for the project (CDP 111-02) (exhibit no.4). The permit approved (1) the construction of an approximately 2,418 - square-foot two story single-family residence with a maximum height of 28 feet above grade; (2) construction of an approximately 690 - square-foot detached garage with a maximum height of 16 feet above grade; and (3) construction of a 16-foot-wide approximately 380-foot-long driveway access to the proposed house site (APN 119-090-42) from Little Lake Road across APNs 119-090-43 and 44. The approved driveway would cross a wetland to access the undeveloped APN 119-090-42 (0.3-acre) to be developed with the approved residence. Electrical, telephone, and sewer services would be extended underground along the proposed driveway. The project includes a 1:1 ratio wetland mitigation plan.

The approved permit imposed several special conditions pertaining to the appeal’s contentions, including: (a) that the applicant complete a boundary line adjustment to merge the undeveloped APNs 119-090-42 and 43; (b) that the applicants record a deed restriction that restricts development on APN 119-090-43 (which contains the majority of the wetland) except for the approved driveway, requires implementation of the five year wetland mitigation plan providing for 1:1 wetland replacement, and specifies that no development shall occur in the wetland or the 100-foot buffer except for the approved driveway and the implementation of the wetland mitigation plan; (c) that annual monitoring reports for the wetland mitigation be provided each year for five years; (d) that all recommendations and measures in the wetland mitigation plan be incorporated into the project; (e) that protective ESHA construction fencing be placed; and (f) that all contractors must be provided copies of the wetland mitigation plan, and be kept in their possession at the work site.

The decision of the Coastal Permit Administrator was not appealed at the local level to the County Board of Supervisors. The County then issued a Notice of Final Action, which was received by the Commission staff on July 7, 2005 (exhibit no. 2). Section 13573 of the Commission's regulations allows for appeals of local approvals to be made directly to the Commission without first having exhausted all local appeals when, as here, the local jurisdiction charges an appeal fee for the filing and processing of local appeals.

The County's approval of the project was appealed to the Coastal Commission in a timely manner on July 21, 2005, within 10-working days after receipt by the Commission of the Notice of Final Local Action.

C. PROJECT AND SITE DESCRIPTION

The approved development is located in the coastal zone in the Town of Mendocino, approximately 1/4 mile east of Highway One, on the north side of Little Lake Road (CR 408) at 44658, 44654 and 44650 Little Lake Road (APNs 119-090-42, 43, 44). The applicant's subject property includes three Assessor Parcel Numbers (APNs) (see exhibit 6). The APNs were formerly considered to be one APN, but four Certificates of Compliance approved by the County in 1998 recognized four separate APNs, and a subsequent boundary line adjustment approved by the County in 1999 resulted in the current configuration of three separate APNs. APN 119-090-44, adjacent to Little Lake Road, is already developed with a residence. The other two APNs behind it and to the north are vacant, and the approved residence would be located on the northernmost APN 119-090-042. Wetlands Research Associates, Inc (WRA) prepared a wetland delineation dated September 2002 and determined that the subject property contains a 0.68-acre wetland, covering virtually all of the middle APN, APN 119-090-043, approximately half of the first APN, APN 119-090-44 adjacent to Little Lake Road, and a smaller portion of the back, northernmost portion of the subject property where the approved residence would be (APN 119-090-042).

The project as approved by the County includes: (1) the construction of an approximately 2,418 - square-foot two story single-family residence with a maximum height of 28 feet above grade on the northern portion of the subject property (APN 119-090-42); (2) construction of an approximately 690 - square-foot detached garage with a maximum height of 16 feet above grade; and (3) construction of a 16-foot-wide approximately 380-foot long driveway access to the proposed house site (APN 119-090-42) from Little Lake Road across the southern portion of the subject parcel (APNs 119-090-43 and 44). The approved driveway would cross a wetland to access the approved residence. Electrical, telephone, and sewer services would be extended underground along the approved driveway. The project includes a 1:1 ratio wetland mitigation plan.

Prior to December 2002 and without a coastal development permit, a road was cleared from Little Lake Road, through the western edges of the first two APNs, to access the back APN and the future approved residence. This road was cleared through a 0.036-acre portion of the 0.68-acre wetland. The unpermitted road impacted the wetland through vegetation removal and a

decrease in water quality caused by vehicles. The County subsequently approved the subject coastal development permit application authorizing the construction of the residence outside of the wetland area (with a 100-foot buffer) on the northernmost portion of the subject property, the “after-the-fact approval” for the previously cleared road, and the future upgrade of the road to County standards, which includes the raising and widening of the access road, including a 10-foot road prism and 3-foot wide utility corridors on either side. This road upgrade would occur in an additional 0.026-acre of wetland, for a total loss of 0.062 acre of wetland habitat when combined with the previous road work. The County also approved a wetland mitigation plan, which includes the creation of 0.068 wetland adjacent and connected to the impacted wetland. A total of 220 cubic yards of wetland fill was authorized for the project.

D. SUBSTANTIAL ISSUE ANALYSIS.

Section 30603(b)(1) of the Coastal Act states:

The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

The term “substantial issue” is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it “finds that the appeal raises no significant question.” (California Code of Regulations, Title 14, Section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

Both contentions raised in this appeal present potentially valid grounds for appeal in that they allege the project's inconsistency with policies of the certified LCP. These contentions allege that the approval of the project by the County raises significant issues related to LCP provisions regarding development in wetlands. In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that with respect to the two allegations concerning the consistency of the project as approved with the provisions of the LCP regarding development in wetlands, the appeal raises a substantial issue with regard to the approved project's conformance with the certified Mendocino County LCP.

Allegations Raising Substantial Issue:

a. Development in Wetlands

The appellants contend that the approval of the residential driveway is inconsistent with the wetland policies of the LCP, which do not include residential uses as allowable developments in wetlands.

LCP Policies

Mendocino County LUP Policy 3.1-4 states:

As required by the Coastal Act, development within wetland areas shall be limited to:

- 1. Port facility construction or expansion, Section 30233(a)(1).*
- 2. Energy facility construction or expansion, Section 30233(a)(1).*
- 3. Coastal-dependent industrial facilities such as commercial fishing facilities, construction or expansion, Section 30233(a)(1).*
- 4. Maintenance or restoration of dredged depths or previously dredged depths in: navigational channels, turning basins, vessel berthing and mooring areas, and associated with boat launching ramps.*
- 5. In wetland areas, only entrance channels for new or expanded boating facilities may be constructed, except that in a degraded wetland, other boating facilities may be permitted under special circumstances, Section 30233(a)(3). New or expanded boating facilities may be permitted in estuaries, Section 30233(a)(4).*
- 6. Incidental public services purposes, including, but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*

7. *Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
8. *Nature study purposes and salmon restoration projects.*
9. *Aquaculture, or similar resource dependent activities excluding ocean ranching. (See Glossary)*

In any of the above instances, the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes, shall be permitted in accordance with all other applicable provisions of this plan. Such requirements shall include a finding that there is no feasible less environmentally damaging alternative and shall include mitigation measures required to minimize adverse environmental effects, in accordance with Sections 30233 and 30607, and other provisions of the Coastal Act [emphasis added].

Coastal Act Section 30233 states, incorporated by reference into the LUP:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- (2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- (3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.*
- (4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (7) Restoration purposes.*
- (8) Nature study, aquaculture, or similar resource dependent activities.*

- (b) *Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems.*
- (c) *In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.*

Coastal Act Section 30607, incorporated by reference into the LUP, states:

Any permit that is issued or any development or action approved on appeal, pursuant to this chapter, shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division.

Section 20.719.005 of the Mendocino Town Zoning Code States:

The provisions of [Chapter 20.496](#), "Environmentally Sensitive Habitat and Other Resource Areas" of the Mendocino County Zoning Code, Title 20, Division II of the Mendocino County Code shall also apply to the Town of Mendocino and shall be incorporated into the Town Zoning Code. (Ord. No. 3915 (part), adopted 1995)[Emphasis added.]

Section 20.496.025 of the Mendocino County Coastal Zoning Code, incorporated by reference into the Town zoning code states, in part, that:

- (A) *Development or activities within wetland and estuary areas shall be limited to the following:*
- (1) Port facility expansion or construction.*
 - (2) Energy facility expansion or construction.*
 - (3) Coastal-dependent industrial facilities, such as commercial fishing facilities, expansion or construction.*
 - (4) Maintenance or restoration of dredged depths or previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and associated boat launching ramps.*

(5) *In wetland areas, only entrance channels for new or expanded boating facilities may be constructed, except that, in a degraded wetland, other boating facilities may be permitted under special circumstances.*

(6) *New or expanded boating facilities may be permitted in estuaries.*

(7) *Incidental public service purposes which temporarily impact the resource including but not limited to burying cables and pipes, or inspection of piers, and maintenance of existing intake and outfall lines.*

(8) *Restoration projects which are allowable pursuant to Section 30233(a)(7) of the Coastal Act are publicly or privately financed projects in which restoration is the sole purpose of the project...*

(9) *Mineral extraction, including sand for restoring beaches, except in ESHA's.*

(10) *Nature study purposes and salmon restoration projects.*

(11) *Aquaculture, or similar resource dependent activities excluding ocean ranching.*

(B) *Requirements for permitted development in wetlands and estuaries.*

(1) *Any proposed development that is a permitted development in wetlands and estuaries must meet the following statutory requirements, and supplemental findings pursuant to [Section 20.532.100](#):*

(a) *There is no feasible, less environmentally damaging alternative;*

(b) *Where there is no feasible, less environmentally damaging alternative, mitigation measures have been provided to minimize adverse environmental effects...[emphasis added]*

Section 20.692.025 of the Mendocino Town Zoning Code states in applicable part:

All development proposed in the Town of Mendocino also shall comply with the provisions of... [Chapter 20.496](#) (Environmentally Sensitive Habitat and Other Resource Areas), [Chapter 20.500](#) (Hazard Areas), [Section 20.532.060](#) (Environmentally Sensitive Habitat Area - Supplemental Application Procedures) and [Section 20.532.100](#) (Supplemental Findings) of [Chapter 20.532](#) (Coastal Development Permit Regulations - General) and [Section 20.504.025\(B\)](#) of Division II of this Title. [emphasis added.]

Section 20.532.100 of the Mendocino County Zoning Code, incorporated by reference in the Town zoning code, states in applicable part:

In addition to required findings, the approving authority may approve or conditionally approve an application for a permit or variance within the Coastal Zone only if the following findings, as applicable, are made:

(A) Resource Protection Impact Findings.

(1) Development in Environmentally Sensitive Habitat Areas. No development shall be allowed in an ESHA unless the following findings are made:

(a) The resource as identified will not be significantly degraded by the proposed development.

(b) There is no feasible less environmentally damaging alternative.

(c) All feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted.

Section 20.496.010 of the County zoning code states in applicable part, and incorporated by reference into the Town code:

...Environmentally Sensitive Habitat Areas (ESHA's) include: anadromous fish streams, sand dunes, rookeries and marine mammal haul-out areas, wetlands, riparian areas, areas of pygmy vegetation which contain species of rare or endangered plants and habitats of rare and endangered plants and animals. [emphasis added.]

Discussion

The approved development allows the construction of a residential driveway through 0.062-acre of wetland to access a future new house. The approved development includes a wetland mitigation plan, utilizing a 1:1 wetland mitigation ratio. The approved driveway construction and the wetland mitigation activities would fill 0.062-acre of wetland with approximately 220 cubic yards of fill material. As discussed previously, most of the driveway was cleared, and fill may have been placed, without benefit of a coastal development permit.

Mendocino County found that there are no alternatives to the approved driveway site to access the approved residence, and hence there are no alternatives but to cross the wetland. Further, the County found that the construction of the road along the subject property's boundary and through the wetland at the narrowest part is the least environmentally damaging alternative, and that without this access road, there is no other feasible way to access the approved residence with vehicles. To mitigate the impacts to 0.062-acre wetland, the County approved a 1:1 wetland mitigation plan. This mitigation includes the creation of a 0.068-acre wetland, and the placement of culverts under the road to facilitate hydrologic continuity during periods of high water flow.

In making the above findings and approving the mitigation plan, the County utilized County Coastal Zoning Code Section 20.532.100(A)(1), incorporated by reference into the Mendocino Town Code, and which requires that supplemental findings be made for developments that occur in environmentally sensitive habitat areas (ESHAs), including wetlands, including findings that

the resource will not be significantly degraded by the development, there are no feasible less environmentally damaging alternatives, and mitigation measures are adopted. However, the County erred in utilizing this section only. Section 20.496.025 of the Mendocino County Coastal Zoning Code, which is also incorporated by reference in the Mendocino Town Code, states that only uses such as ports, recreational boating facilities, and restoration purposes (where the sole purpose of the project is restoration) are permitted uses in wetlands, not residential uses. In fact, it is this same section which incorporates the supplemental findings in Section 20.532.100 for those uses permitted in wetlands, stating, “Any proposed development that is a permitted development in wetlands and estuaries must meet the following statutory requirements, and supplemental findings pursuant to Section 20.532.100: (a) There is no feasible, less environmentally damaging alternative; (b) Where there is no feasible, less environmentally damaging alternative, mitigation measures have been provided to minimize adverse environmental effects...”

Thus, because residential driveways are not allowable developments in wetlands pursuant to the LCP wetlands policies, the degree of legal and factual support for the local government’s decision is low. Therefore, the Commission finds that the project as approved raises a substantial issue of conformance with the provisions of LUP Policy 3.1-4, Mendocino County Coastal Zoning Code Section 20.496.025, and Mendocino Town Zoning Code Sections 20.692.025 and 20.719.005.

b. Least Environmentally Damaging Feasible Alternative

The Appellants further contend that even if the residential driveway were an allowable development in a wetland, the driveway as approved by the County would still be inconsistent with ESHA provisions in the LCP requiring that the project be the “least environmentally damaging alternative,” because there are feasible less environmentally damaging alternatives, including (a) bridging or cantilevering the vehicular access over the wetland and (b) not conducting any development on the subject property, which would require no wetland fill, and because there is already an existing residence on APN APN 119-090-44, providing for a reasonable use of the property.

LCP Policies

Mendocino County LUP Policy 3.1-4 states in applicable part (full text included in Contention (a)) (emphasis added):

...In any of the above instances, the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes, shall be permitted in accordance with all other applicable provisions of this plan. Such requirements shall include a finding that there is no feasible less environmentally damaging alternative and shall include mitigation measures required to minimize adverse environmental effects, in accordance with Sections 30233 and 30607, and other provisions of the Coastal Act.

Coastal Act Section 30233, incorporated by reference into the LUP, states in applicable part (full text included in Contention (a)) (emphasis added):

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:...

Section 20.719.005 of the Mendocino Town Zoning Code States:

The provisions of [Chapter 20.496](#), "Environmentally Sensitive Habitat and Other Resource Areas" of the Mendocino County Zoning Code, Title 20, Division II of the Mendocino County Code shall also apply to the Town of Mendocino and shall be incorporated into the Town Zoning Code. (Ord. No. 3915 (part), adopted 1995)

Section 20.496.025 of the Mendocino County Coastal Zoning Code, which is incorporated by reference into the Town Code, states in applicable part:

...

(B) Requirements for permitted development in wetlands and estuaries.

(1) Any proposed development that is a permitted development in wetlands and estuaries must meet the following statutory requirements, and supplemental findings pursuant to [Section 20.532.100](#):

(a) There is no feasible, less environmentally damaging alternative;

(b) Where there is no feasible, less environmentally damaging alternative, mitigation measures have been provided to minimize adverse environmental effects...[emphasis added]

Section 20.692.025 of the Mendocino Town Zoning Code states in applicable part:

All development proposed in the Town of Mendocino also shall comply with the provisions of... [Chapter 20.496](#) (Environmentally Sensitive Habitat and Other Resource Areas), [Chapter 20.500](#) (Hazard Areas), [Section 20.532.060](#) (Environmentally Sensitive Habitat Area - Supplemental Application Procedures) and Section 20.532.100 (Supplemental Findings) of Chapter 20.532 (Coastal Development Permit Regulations-General) and Section 20.504.025(B) of Division II of this Title.

Section 20.532.100 of the Mendocino County Coastal Zoning Code, incorporated by reference into the Town code, states:

In addition to required findings, the approving authority may approve or conditionally approve an application for a permit or variance within the Coastal Zone only if the following findings, as applicable, are made:

(A) Resource Protection Impact Findings.

(1) Development in Environmentally Sensitive Habitat Areas. No development shall be allowed in an ESHA unless the following findings are made:

(a) The resource as identified will not be significantly degraded by the proposed development.

(b) There is no feasible less environmentally damaging alternative.

(c) All feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted [emphasis added.]

Coastal Zoning Code Section 20.496.010 “Environmentally Sensitive Habitat and other Resource Areas—Purpose,” incorporated by reference into the Town Code, states (emphasis added):

...Environmentally Sensitive Habitat Areas (ESHA's) include: anadromous fish streams, sand dunes, rookeries and marine mammal haul-out areas, wetlands, riparian areas, areas of pygmy vegetation which contain species of rare or endangered plants and habitats of rare and endangered plants and animals.

Discussion

Mendocino County LUP Policy 3.4-1 and Sections 20.496.025(B)(1)(a) and 20.532.100 of the Mendocino County Coastal Zoning Code, which are incorporated by reference into the Town Code, state that any development that is permitted in wetlands must satisfy several tests, including that the development be the “least environmentally damaging feasible alternative.” In the staff report for the approved project, the County finds that the project is the least environmentally damaging alternative, but provides no analysis or evidence to support this finding. The County staff report states:

“Other potential vehicular access ways that would not require development in the wetland have been researched by the owner and eliminated. Further, the existing driveway needs to be corrected to address erosion and water quality issues. Short of not allowing any residential development of either unimproved parcel, there is not a less environmentally damaging alternative (6/23/05 County Staff Report, p. CPA-7).”

The above statements do not evaluate, nor do they support a finding that the project is the “least environmentally damaging feasible alternative.” The statements do not address (1) other potential vehicular access ways that are alternatives to the approved driveway, and (2) the feasibility of the “no development” option, which would not require any wetland fill.

The County staff report provided no information as to what other vehicular access ways were explored. The County's analysis did not address the alternative of creating an elevated vehicular access way over the wetland, by bridging or cantilevering over the wetlands. In addition, the "no development" alternative was not thoroughly analyzed by the County. APNs 119-090-42, 43, and 44 are in single ownership and the subject property is already in residential use with an existing residence outside of the wetland area on the southern portion of the subject property, which is accessed directly from Little Lake Road. Because of this, the "no development" alternative may be a viable alternative because it would not use any wetland fill and the existing residence would provide for a reasonable use of the property.

Therefore, the County had little legal or factual basis with which to make the finding that there are no feasible less environmentally damaging alternatives. The Commission finds that the project as approved raises a substantial issue of conformance with the provisions LUP Policy 3.4-1, and Mendocino Town Zoning Code Sections 20.692.025 and 20.719.005, as well as Sections 20.496.025(B)(1)(a) and 20.532.100 of the Mendocino County Coastal Zoning Code, which have been incorporated by reference into the Town Code.

Conclusion

All of the various foregoing contentions raised by the appellants have been evaluated against the claim that they raise a substantial issue in regard to conformance of the local approval with the certified LCP. The Commission finds that the project as approved raises a substantial issue of conformance with the certified LCP with respect to all the contentions raised.

E. INFORMATION NEEDED FOR *DE NOVO* REVIEW OF APPLICATION

As stated above, Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which an appeal has been filed. Section 30621 of the Coastal Act instructs the Commission to provide for a *de novo* hearing on all appeals where it has determined that a substantial issue exists with respect to the grounds on which an appeal has been filed. If the Commission finds substantial issue as recommended above, staff also recommends that the Commission continue the *de novo* hearing to a subsequent date. The *de novo* portion of the appeal must be continued because the Commission does not have sufficient information to determine what, if any, development can be approved, consistent with the certified LCP.

Given that the project the Commission will be considering *de novo* has come to the Commission after an appeal of a local government action, the Commission has not previously been in the position to request information from the applicant needed to determine if the project can be found to be consistent with the certified LCP. Following is a discussion of the information needed to evaluate the development.

1. Alternatives Analyses

As discussed above, for those allowable uses in a wetland, authorization of the placement of fill in wetlands is contingent on making findings that there is no feasible less environmentally damaging alternative. Because the existing County Staff Report does not have sufficient information with which to make these findings, an analysis of the presence of feasible less environmentally damaging alternative driveway designs or locations is needed as prescribed in Coastal Zoning Code 20.523.100(A)(1). This analysis should encompass, at a minimum, a review of: (1) other potential vehicular access ways that are alternatives to the approved driveway, such as the alternative of creating an elevated vehicular access way over the wetland, by bridging or cantilevering over the wetlands, which would not have required any loss of wetlands; and (2) the feasibility of the “no development” option, which would not require any wetland fill. The analysis should quantify the square footage of coverage and ground and/or wetland fill associated with each alternative and include a biological assessment of the potential direct and indirect impacts to the wetland for each alternative, an analysis of the relative compatibility of development in each location with the continuance of the wetland by maintaining its functional capacity, its ability to be self-sustaining, and to maintain natural species diversity. The analysis should also discuss all other applicable limitations and restrictions on development that may affect the feasibility of development in the specified locations (i.e., required setbacks from property lines and access drives, the presence of problematic soils and/or geologic instability, preclusions within deed CC&Rs, etc.)

2. Information Needed to Evaluate the Legality of APNs 119-090-42, 43, and 44

Because there appears to be some evidence that the subject property was historically transferred as a single parcel and is in single ownership, an analysis of the legality of APNs 119-090-42, 43, and 44 as separate parcels is needed to help determine the legal development potential on the subject property (which already contains one residence) consistent with the Mendocino County LCP policies which limit second residences on single parcels. This analysis must include, but is not limited to, the following:

- A. The historic chain of title for the subject property;
- B. Whether the real property in question complies with the provisions of the Subdivision Map Act and County Ordinances enacted pursuant.

3. Information Needed to Evaluate Project Consistency with Coastal Act Section 30010

If the project cannot be found consistent with the wetlands policies of the certified Mendocino Local Coastal Program, the Commission will need to evaluate whether an alternative proposal could be approved, and if not, whether denial of the project would result in an unconstitutional taking of private property for public use. In order to make that evaluation, the Commission will need to request additional information from the applicant concerning the applicant’s reasonable investment-backed expectations to make

such determinations prior to holding a *de novo* hearing on the project. Specifically, in addition to providing the Commission with an analysis of alternatives to the proposed project that would be less environmentally damaging to wetlands as required by the certified LCP, and an analysis of the legality of APNs 119-090-42, 43, and 44 as separate parcels, the landowner of the property that is the subject of A-1-MEN-05-035 must provide the following information for the property that is subject to A-1-MEN-05-035 as well as all property on common contiguous ownership, i.e. any immediately adjacent property also owned by the applicant:

1. When the property was acquired, and from whom;
2. The purchase price paid for the property;
3. The fair market value of the property at the time it was acquired and the basis upon which fair market value was derived;
4. Whether a general plan, zoning, or similar land use designations applicable to the property changed since the time the property was purchased. If so, identify the particular designation(s) and applicable change(s).
5. At the time the property was purchased, or at any subsequent time, whether the project been subject to any development restriction(s) (e.g., restrictive covenants, open space easements, etc.), other than the land use designations referred to in the preceding question;
6. Whether the size or use of the property changed in any way since it was purchased. If so, identify the nature of the change, the circumstances and the relative date(s);
7. Whether a portion of, or interest in, the property was sold or leased since the time the applicants purchased it, and the relevant date(s), sales price(s), rent assessed, and the nature of the portion or interest sold or leased;
8. A copy of any title report, litigation guarantee or similar document that might have been prepared in connection with all or a portion of the property, together with a statement of when the document was prepared and for what purpose (e.g., refinancing, sale, purchase, etc.);
9. The approximate date and offered price of any offers to buy all or a portion of the property since the time the applicants purchased the property;
10. The costs associated with ownership of the property on an annualized basis for the last five calendar years. These costs should include, but not necessarily be limited to, the following:

- property taxes
- property assessments
- debt service, including mortgage and interest costs; and
- operation and management costs; and

11. Whether apart from any rent received from leasing all or a portion of the property (see question #7 above), current or past use of the property generates any income. If the answer is yes, the amount of generated income on an annualized basis for the past five calendar years and a description of the use(s) that generates or has generated such income.

4. Historical Information on the Proposed Driveway

The County staff report states that the proposed driveway was “cleared” in 2002, and that this was done without the benefit of a coastal development permit. However, it is unclear as to whether and to what extent an older driveway/road existed in this location, and if so, when it was constructed. In order to evaluate the proposed driveway improvements for consistency with the policies of the LCP, additional information is needed from the applicant concerning the historical use of the subject property, what driveway improvements existed prior to when coastal development permit requirements went into effect, and what driveway improvements have been conducted since coastal development permit requirements went into effect.

Without the above information, the Commission cannot reach a final determination concerning the consistency of the project with the wetland policies of the LCP, the consistency of the proposed development with LCP policies limiting 2nd residences on single parcels, and the project’s consistency with Coastal Act Section 30010. Therefore, before the Commission can act on the proposed project *de novo*, the applicant must submit all of the above-identified information.

EXHIBITS

1. Regional Location Map
2. Vicinity Map
3. Subject Property
4. Project Plans
5. Notice of Final Local Action
6. Appeal